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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-873

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, *et al.*,

Petitioners,

—against—

JOSEPH CALIFANO, Secretary, United States Department of Health, Education and Welfare, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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Opinion Below

The opinion of the Court of Appeals (Pet. App. 1)* is reported at 584 F. 2d 576 (2d Cir. 1978). The opinion of the District Court (Pet. App. 30) is not reported.

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* In this brief, "App." refers to the appendix submitted to this Court; "C.A. App." refers to the appendix submitted to the Court of Appeals; "Pet. App." refers to the appendix to the Petition for Certiorari.

Jurisdiction

The judgment of the Court of Appeals was entered on August 21, 1978. A petition for rehearing with a suggestion for a rehearing *en banc* was denied on October 6, 1978. (Pet. App. II). The petition for a writ of certiorari was filed on November 30, 1978, and was granted on February 20, 1979. (App. 153). The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Questions Presented

(1) Whether the Court of Appeals erred in holding that the Department of Health, Education and Welfare may reject a school district's application for funding under the Emergency School Aid Act solely on the basis that the school district's teacher assignment policies have a disparate racial impact, and without finding that the policies violate the Equal Protection Clause of the Fourteenth Amendment.

(2) Whether the Court of Appeals erred in holding that discrimination in violation of Title VI of the 1964 Civil Rights Act may be established solely by evidence of disparate impact and therefore that discrimination under the Emergency School Aid Act may be established by the same standard.

(3) Whether the Department of Health, Education and Welfare erred in finding that the New York City Board of Education's teacher assignment policies were violative of the Equal Protection Clause of the Fourteenth Amendment.

Statutes Involved

The Fourteenth Amendment to the Constitution:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Emergency School Aid Act, 20 U.S.C. §1601:

> (a) The Congress finds that the process of eliminating or preventing minority group isolation and improving the quality of education for all children often involves the expenditure of additional funds to which local educational agencies do not have access.
>
> (b) The purpose of this chapter is to provide financial assistance—
>
> (1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students and faculty in elementary and secondary schools;
>
> (2) to encourage the voluntary elimination, reduction, or prevention of minority group isolation in elementary and secondary schools with substantial proportions of minority group students; and
>
> (3) to aid school children in overcoming the educational disadvantages of minority group isolation.

Emergency School Aid Act, 20 U.S.C. §1602:

(a) It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

Emergency School Aid Act, 20 U.S.C. §1605(d)(1):

No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—

(A) transferred (directly or indirectly by gift, lease, loan, sale, or other means) real or personal property to, or made any services available to, any transferee which it knew or reasonably should have known to be a nonpublic school or school system (or any organization controlling, or intending to establish, such a school or school system) without prior determination that such nonpublic school or school system (i) is not operated on a racially segregated basis as an alternative for children seeking to avoid attendance in desegregated public schools, and (ii) does not otherwise practice, or permit to be practiced, discrimination on the basis of race, color, or national origin in the operation of any school activity;

(B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility);

(C) in conjunction with desegregation or the conduct of an activity described in this section, had in effect any procedure for the assignment of children to or within classes which results in the separation of minority group from nonminority group children for a substantial portion of the school day, except that this clause does not prohibit the use of bona fide ability grouping by a local educational agency as a standard pedagogical practice; or

(D) had in effect any other practice, policy, or procedure, such as limiting curricular or extracurricular activities (or participation therein by children) in order to avoid the participation of minority group children in such activities, which discriminates among children on the basis of race, color, or national origin;

except that, in the case of any local educational agency which is ineligible for assistance by reason of clause (A), (B), (C), or (D), such agency may make application for a

waiver of ineligibility, which application shall specify the reason for its ineligibility, contain such information and assurances as the Secretary shall require by regulation in order to insure that any practice, policy, or procedure, or other activity resulting in the ineligibility has ceased to exist or occur and include such provisions as are necessary to insure that such activities do not reoccur after the submission of the application.

Title VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

45 C.F.R. §185.43(b) (2):

> No educational agency shall be eligible for assistance under the Act if, after June 23, 1972, it has had or maintained in effect any other practice, policy, or procedure which results in discrimination on the basis of race, color, or national origin in the recruiting, hiring, promotion, payment, demotion, dismissal, or assignment of any of its employees (or other personnel for which such agency has any administrative responsibility), including the assignment of full-time classroom teachers to the schools of such agency in such a manner as to identify any of such schools as intended for students of a particular race, color, or national origin.

Statement

In April, 1977, the Board of Education of the City of New York ("the Board"), and local community school boards ("CSBs")* submitted a total of 32 applications to the United States Department of Health, Education and Welfare ("HEW") for 1977-78 funding under the Emergency School Aid Act ("ESAA"), 20 U.S.C. § 1601 *et seq.*, to foster integration and eliminate or prevent minority group isolation for approximately 40,000 students in elementary and secondary schools in the New York City school system.

Prior to July 1, 1977, the Board and nineteen CSBs were advised by HEW that their applications met the minimum qualifications for ESAA funding and that approximately $17.5 million had been earmarked as their share of the 1977-78 ESAA appropriation. However, on July 1, 1977, HEW notified the Board and CSBs that they were ineligible for ESAA funding pursuant to 20 U.S.C. § 1605(d)(1)(B) and 45 C.F.R. 185.43(b)(2). (App. 27; Pet. App. 32). Statistics developed by the Office of Civil Rights of HEW in a 1976 Title VI compliance investigation of the New York City school system (App. 7), allegedly demonstrated that teacher assignments in some elementary and junior high schools operated by the CSBs and in some high schools operated by the Board, resulted in their racial identifiability. There was found to be a direct correlation between the numbers of minority teach-

* Under New York State's 1969 "Decentralization Law" (N.Y. Educ. Law §2590-j (McKinney Supp. 1970)), CSBs are vested with primary responsibility for operating the elementary and junior high schools in their districts while the central Board had direct authority over the high schools, special education and other special programs.

ers and the percentage of minority students in some schools when the schools were broken down into groups of low, medium and high minority school population.*

Upon notification of ineligibility, the Board and individual CSB applicants initiated proceedings pursuant to 45 C.F.R. § 185.46. At these proceedings, the Board and CSBs offered proof rebutting the statistical disparity, but HEW ruled that the agency's inquiry would be limited to the accuracy of the statistics upon which HEW made its determination to deny ESAA funding to the New York City applicants. (C.A. App. 319). No substantive rebuttal or explanation for the statistical disparities was considered. On September 16, 1977, HEW issued an opinion adhering to the July 1, 1977 decision denying the applicants ESAA funding.

Thereafter, this action was commenced in the District Court for the Eastern District of New York (Weinstein, J.) by the Board and CSB 11, seeking to enjoin HEW from enforcing its determination of July 1, 1977, that they were ineligible for ESAA funding due to the existence of racially identifiable schools on the basis of teacher assignments.** The action was brought on by

* Other alleged violations of Title VI by the Board were set out in January 18, 1977 and October 4, 1977 letters to Chancellor Anker from the Office of Civil Rights. These issues were voluntarily resolved by the Board and HEW. Teacher assignments remained the only outstanding issue with respect to ESAA eligibility. To resolve this issue the Board and HEW entered into a Memorandum of Understanding (App. 44). *See, infra,* p. 21 (note).

** All other CSBs whose applications met the programmatic minimums for funding, except CSB 10, resolved their conflicts with HEW either at the show cause proceedings or by means of obtaining waivers of ineligibility (20 U.S.C. §1605(d)). Approximately $14 million was released to the eligible CSBs. CSB 10 chose not to contest its ineligibility. After the Court of Appeals decision in this case, CSB 11 also resolved its dispute with HEW, thus leaving the Board as the only remaining party to this action.

order to show cause and included a temporary restraining order requiring HEW to preserve and set aside the ESAA funds earmarked for the Board ($3,559,132) and CSB 11 ($298,891). (App. 56; C.A. App. 1-45, 508-526).

Following review of the administrative record and after a hearing, the Court denied the Board's motion for summary judgment and granted HEW's cross-motion for summary judgment affirming the denial of ESAA funding (App. 72). However, upon the Board's motion for reargument (C.A. App. 266-270), the District Court granted judgment for the Board and CSB 11 and remanded their ESAA applications to defendants for *de novo* consideration consistent with the principles set forth in its opinion. (Pet. App. 30).

The District Court in its opinion rejected HEW's contention that, under ESAA, a school district evidencing statistical racial imbalance could not offer a substantive rebuttal to the statistical showing of segregation. Instead, the Court, citing *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975), for a foreseeability/intent test, held that constitutional standards apply to ESAA eligibility determinations and that a school district's explanation for the statistical disparity must be considered. The District Court stated:

> Before declaring a school board ineligible for ESAA funds, HEW must find either that (1) the school board was maintaining an illegally segregated school system on June 23, 1972 and it took no effective steps to desegregate after that date or (2) it had a practice after June 23, 1972 that was segregative in intent, design or foreseeable effect. It may rely on statistics alone to make the funding, but it may not ignore

evidence to rebut the inference drawn from the statistics.

(Pet. App. 102-103). The Court remanded the Board's application to HEW for *de novo* consideration of the evidence offered by the Board rebutting HEW's statistical showing of racial disparity.

Upon remand, the Board submitted the following justifications for the racial identifiability of some high schools on the basis of teacher assignment:

(1) The pool of eligible minority teachers tends to concentrate in certain specific license areas (mainly vocational) and is relatively small in many academic and science license areas and, therefore, there are concentrations of minority teachers in high schools which provide a particular type of curriculum. The Board asserted that such concentration, due to factors beyond its control, precludes the random distribution of staff sought by HEW. (App. 7, 90-92; Pet. App. 53-54).

(2) The impact of a court ordered consent decree in *Aspira of New York v. Board of Education* 65 F.R.D. 541 (S.D.N.Y. 1974), requiring the provision of bilingual instruction to Spanish-language dominant children, resulted in the concentration of Hispanic teachers in schools with high percentages of Hispanic children. (App. 83-84, 121-23; Pet. App. 54, 63-64).

(3) Under state law, the appointment of teachers in the high schools is by competitive examination without any identification as to race. HEW, in its November 9, 1976 Title VI non-compliance letter (App. 7) questioned these examinations on the grounds of disparate impact. Nevertheless, there has not been a final administrative or judicial determination that these exams were discriminatory under Title VI or the Constitution. (Pet. App. 57).

(4) Teacher assignments are based on seniority and excessing provisions* which are contained in the collective bargaining agreements between the Board and the teachers' union and, as a matter of preference, teachers choose schools near their homes or schools they otherwise find preferable. Ethnic concentrations are a result. (App. 83-85; Pet. App. 62-63).

(5) HEW's statistical analysis inappropriately included certain schools which were of a specialized nature and which provided a program to a very small number of children (approximately 100 per program) who have serious truancy problems. These programs, called "alternative high schools," attempt to provide a very specialized curriculum which will encourage these students to continue their education. The student population in such programs is largely minority. The teacher staffing is strictly voluntary. Minority teachers have volunteered in higher percentages in these schools. The Board contended that these schools are really select programs and should not be grouped with 1500 to 3000 student high schools. (App. 87-88; Pet. App. 51-52).

(6) Over the past 20 years the trend in the racial composition of the city school system's student popula-

* Excessing denotes the number of teachers in excess of prescribed teacher quotas based on student enrollment. Where enrollment declines schools are required to transfer or excess the least senior employees to receiving schools, that is, schools which have vacancies to be filled.

tion has gone from 68.3% non-minority in 1957 to 32.2% non-minority in 1975. In the high schools the change is more dramatic. In 1960, 79% of the high school population was non-minority. In 1975, only 37.4% was non-minority. Other factors, such as housing patterns, have made for fewer concentrations of contiguous minority and non-minority populations, thereby making certain schools minority dominant. This circumstance has given rise to shifts in the racial identity of schools, without any action on the part of the Board. (App. 76-80). Coupled with the change in the racial identity of city schools is the low teacher vacancy rate at non-minority dominant schools and the inability of the Board to get non-minority staff to teach at many of the minority staff to teach at many of the minority dominant schools. (App. 95-101; C.A. App. 788-791). Further, the Board submitted proof of minimal loss of minority staff from the non-minority dominant schools. (C.A. App. 791).

On March 22, 1978, after the *de novo* review, HEW notified the Board that it again had been found ineligible for ESAA funding (App. 102). HEW's conclusion was bottomed on the statistical racial disparity of faculty assignments in some high schools. However, whereas its initial determination of the Boards' ineligibility focused on disparate teacher assignments in 39 high schools (App. 42-43; Pet. App. 14-15; 584 F. 2d at 583), after the *de novo* review, HEW focused on the disparities in only 10 schools (App. 109-110; Pet. App. 16; 584 F. 2d at 584).*

HEW's *de novo* consideration of the Board's application differed from its original determination only to the extent

* It should be noted that in March of 1978, the Board operated a total of 110 secondary schools. (App. 90).

that it purportedly took into account the Board's rebuttal evidence. In its March 22, 1978 letter HEW indicated that in accordance with the District Court's instructions on its remand, it had applied constitutional standards as set forth in *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975) and *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971) (App. 108, 112-113), in determining whether the Board's teacher assignment policies were grounds for a finding of ineligibility. HEW stated:

> We hereby determine, as required by the court, that on and before June 23, 1972, the City School District of the City of New York discriminated on a racial basis in the assignment of teachers and maintained an illegally segregated system in violation of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, and the requirements of the ESAA. We also determine that after June 23, 1972, the district took no effective steps to desegregate the system, which it had illegally segregated and maintained a system of illegal treatment of teachers through discriminatory practices and assignments which were segregative in intent, design, or foreseeable effect. The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination, but its explanations are not persuasive.
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> • • • • •
>
> It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from

> OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano.* Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often are staffed by few and sometimes no minority teachers.

(App. 107-108).

On April 12, 1978, the Board again applied to the District Court for a preliminary injunction against enforcement of the March 22, 1978 decision. (App. 127; C.A. App. 281-283, 496-507). The Court consolidated the preliminary injunction application with trial of the action on the merits and on April 12, 1978, rendered a decision denying the Board's application for injunctive relief and sustaining HEW's March 22, 1978 finding on the basis that the HEW determination was supported by substantial evidence in the administrative record. (App. 127-128; C.A. App. 833-839). In its order (App. 149-152), the District Court stayed distribution of any funds by HEW for nine days to permit the filing of an appeal by the Board.

On April 12, 1978, the Board filed a notice of appeal with the United States Court of Appeals for the Second Circuit. (C.A. App. 843). Thereafter, the Board applied for a stay of the disbursement of the approximate $3.5 million ESAA funds pending appellate review. On April 28, 1978, a stay pending a determination of the appeal was granted.

The Court of Appeals rendered its decision on August 21, 1978. It held that it was unnecessary to determine whether the evidence supported a finding of purposeful segregative intent. (Pet. App. 23-24; 584 F. 2d at 577-588). Instead, Judge Oakes, writing for the Court, affirmed the result reached by the District Court on the ground that the

evidence supported a finding of discrimination under a disparate impact test:

> Here [in ESAA], Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments.

(Pet. App. 25; 584 F. 2d at 588).

The Court of Appeals went even further, and observed that "the district court's remand to HEW was, * * * erroneous, though immaterial here." (Pet. App. 27; 584 F. 2d at 590). Implicit in this observation is support for HEW's initial test of ESAA ineligibility which was found to be improper by the District Court. Under that test, statistical racial disparity in staff assignments *per se* is sufficient to sustain a finding of ineligibility. The statistics may be rebutted only to the extent of establishing that there was a miscalculation; justifications for the disparities are not considered.

On September 5, 1978, petitioners filed a petition for rehearing with a suggestion for a rehearing *en banc.* This stayed the issuance of the Court of Appeals' mandate, thereby preserving the $3.5 million fund earmarked for the Board. The petition was denied on October 6, 1978. On October 26, 1978 the Board moved in the Court of Appeals for a stay of the issuance of its mandate, and thus disbursement of the $3.5 million fund, pending application to this Court for a writ of certiorari. The motion was granted on October 31, 1978. The petition for a writ of certiorari was filed on November 30, 1978 and was granted on February 20, 1979 (App. 153). Under Rule 41(b) of the Rules of Appellate Procedure, the Court of Appeals' stay of the issuance of its mandate has been continued.

Summary of Argument

In part I of our argument we demonstrate, based upon the plain meaning of the Emergency School Aid Act ("ESAA") and upon an extensive examination of its legislative history, that it was not Congress' intent to permit the Department of Health, Education and Welfare ("HEW") to find an applicant ineligible for ESAA funding due to its staff assignment policies unless those policies constitute discrimination violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution. This is clear from the distinction drawn between staff assignment policies and staff demotions or dismissals as bases for ineligibility. 20 U.S.C. §1605(d)(1)(B). An applicant must have actually "engaged" in "discrimination" in the assignment of staff to be held ineligible for funding, whereas staff demotions or dismissals will trigger ineligibility where there is simply "disproportionate" impact. *Id.* We further point out that the Court of Appeals' reliance on 20 U.S.C. §1602(a) as mandating a disparate impact test for determining ESAA ineligibility was misplaced. The legislative history reveals that section 1602(a) is a policy statement and by no means intended to alter or affect the substantive eligibility standards set forth in section 1605(d)(1)(B).

We next note the role of Title VI of the 1964 Civil Rights Act as prohibiting discrimination in all Federally funded programs, and thus contend that Title VI's test for determining discrimination is applicable to determining discrimination and eligibility under ESAA. The argument is then made, in light of this Court's *Bakke* decision (*Regents of the University of California v. Bakke,* 438 U.S. 265 (1978)), as well as the legislative history of Title VI, that

in fact, contrary to the inference which might be drawn from *Lau v. Nichols,* 414 U.S. 563 (1974), Title VI's test for discrimination is precisely the same as that imposed under the Equal Protection Clause, *i.e.,* a test based on segregative intent. *See generally, Dayton v. Brinkman,* 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1, Denver, Colorado,* 413 U.S. 189 (1973). Part I of our argment thus establishes that the Court of Appeals erred in holding that the disparate impact test applies to determinations of ESAA eligibility where staff assignment policies are in issue.

In part II of our argument we discuss the holdings of this Court, in *Dayton, Arlington Heights, Davis* and *Keyes,* which require a showing of purposeful or intentional discrimination in order to establish a violation of the Equal Protection Clause. We point out that HEW failed to apply or even refer to these cases in concluding that the Board's teacher assignment policies were discriminatory. Instead, HEW relied upon a test for determining intentional discrimination which infers intent from policies or practices that have the "foreseeable" result of discrimination. *See, Arthur v. Nyquist,* 573 F. 2d 134 (2d Cir. 1978), *cert. den. sub nom., Manch v. Arthur,* —— U.S. ——, 99 S.Ct. 179 (1978); *Hart v. Community School Board,* 512 F. 2d 37 (2d Cir. 1975). We argue that, unlike the Second Circuit, this Court has not adopted the foreseeability test as a means of demonstrating an Equal Protection violation and thus HEW's analysis was deficient. Moreover, we demonstrate that even assuming the viability of the foreseeability test, HEW's purported finding that the Board's teacher assignment policies had the foreseeable consequence of segregation was based solely on statistical evidence of disparate impact. Such an analysis is clearly inconsistent with this

Court's holdings in *Arlington Heights, et al.*, and, in fact, fails to even meet the test set forth in *Arthur* and *Hart*.

It is next argued that on the evidence in this case, HEW could not have rationally determined that the racially disparate staffing pattern in some New York City public high schools was the product of intentional segregative conduct by the Board.

We finally point out that HEW erred in relying on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), in alleging that the racial identifiability of some high schools on the basis of teacher assignment constituted a violation of the Equal Protection Clause. *Swann's* language that disproportionate staff assignments constitute a *prima facie* case of intentional discrimination was meant to apply to determining the permissible scope of court-ordered desegregation in dual school systems. This Court's decision in *Keyes v. School Dist. No. 1, supra*, 413 U.S. 129, clearly demonstrates that *Swann's* holding is not applicable where, as in the case of the Board, there is no history of *de jure* segregation.

Based upon this analysis, we urge that the judgment of the Court of Appeals should be reversed and this matter remanded to the District Court with directions that the Board should be awarded appropriate declaratory and injunctive relief.

ARGUMENT

I.

The Court of Appeals erred in holding that a test of disparate impact based on teacher assignments may be used to determine eligibility for funding under the Emergency School Aid Act.

In this case the Court of Appeals held that ESAA itself requires application of an impact test in determining eligibility for funding. The Court also held that Title VI incorporates such a test and thus the school staffing patterns here in question violated Title VI. On this ground as well the Court held that the Board was ineligible for funding. Both holdings are incorrect. Neither ESAA nor Title VI imposes such a test.

A. *The legislative history of ESAA overwhelmingly indicates that in enacting this statute Congress intended to adopt the constitutional test of discrimination.*

(1)

Title VII of the Education Amendments of 1972*, the Emergency School Aid Act, 20 U. S. C. §1601, *et seq.*, is intended to provide additional funds to local educational agencies for the purpose of assisting them in the process of eliminating or preventing minority group isolation and in improving the quality of education for all children. 20 U.S.C. §1601. To that end, educational agencies may apply for grant assistance for certain authorized activities, including special remedial services, provision of additional and specially trained staff, counselling, career education,

* Pub. L. No. 92-318, Title VII, §§701-720, 86 Stat. 354 (1972).

interracial programs, bi-lingual programs and other projects, such as educational television, all geared toward eliminating minority group isolation and maintaining a high level of educational quality. 20 U. S. C. §§1606-1608, 1610.

Funds available under ESAA for distribution to eligible local educational agencies are apportioned by the Assistant Secretary of the Office of Education pursuant to 20 U. S. C. §1604 and the regulations promulgated thereunder. 45 CFR §185.01 *et seq.* Applications are reviewed in accordance with the requirements and criteria set forth in 20 U.S.C. §§1609 and 1616. ESAA is a competitive funding program. Only those applications containing the greatest programmatic merit will be successful.

To be eligible for assistance, an educational agency must establish that it is implementing a desegregation plan which is either court ordered or approved by the Secretary of HEW as adequate under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, or has adopted or is implementing or will implement a voluntary plan to eliminate or reduce racial isolation in its school system. 20 U.S.C. §1605(a).

There are, however, certain non-programmatic limitations on eligibility. No educational agency shall be eligible for funding if, after June 23, 1972, it has engaged in one of the enumerated prohibited practices, policies or procedures set forth in 20 U.S.C. §1605(d)(1)(A)-(D). At issue in this case in section 1605(d)(1)(B) which provides, in pertinent part, that the local educational agency is rendered ineligible if it "engaged in discrimination based on race, color or national origin in the hiring, promotion or assignment of employees of the agency * * *." *See also,* 45 C.F.R. 185.43 (b)(2).

If a local educational agency is found to be ineligible by reason of §1605(d)(1)(A)-(D), it may make an application for a waiver of ineligibility to the Secretary of HEW pursuant to the requirements set forth in section 1605(d)(1) and 45 C.F.R. §185.44.* If the waiver is granted, funding is available nothwithstanding the initial finding of ineligibility.

The ESAA legislation was the subject of extensive debate and consideration in three separate sessions of Congress.** As originally introduced, Congress described the purpose of ESAA as meeting "added costs of special programs and staff required for effective desegregation and for meaningful efforts to reduce, eliminate or prevent the isolation of

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* The issue of when a waiver of ineligibility is available is presently pending before the Court of Appeals for the Second Circuit in the related case of *Board of Education v. Califano,* 78 Civ. 2135 (E.D.N.Y. filed December 22, 1978) (Weinstein, J.), which arose out of HEW's denial of the Board's application for 1978-79 ESAA funding. As in the instant case, HEW found the Board ineligible for 1978-79 ESAA funds on the basis of the alleged discriminatory impact of the Board's teacher assignment policies. The Board then applied for a waiver of ineligibility, which HEW denied. The District Court has remanded the Board's application for a waiver of ineligibility back to HEW for reconsideration in light of the Court's opinion. The Court rejected HEW's interpretation of ESAA that a waiver is available only when the allegedly discriminatory policies *and* their *effects* have "ceased to exist." 20 U.S.C. §1605(d). The District Court held that a halt to the alleged practices or policies combined with a plan which would lead to an elimination of all effects in the future would satisfy the requirements for obtaining a waiver of ineligibility. The Court also entered an injunction mandating that HEW preserve the 1978-79 ESAA funds which the Board would have received (were it not for the determination of ineligibility and denial of its application for a waiver). The District Court order prevents the loss of 1978-79 ESAA funds ($2.4 million) pending HEW's review of the Board's phased plan to eliminate the effects of allegedly discriminatory policies and the outcome of the instant case.

** *See,* the appendix to this brief for a capsulized history of the ESAA legislation.

minority group children" and "to bring about better integrated quality education." 116 Cong. Rec. 44410, 91st Cong. 2d Sess. (1970) (remarks of Sen. Griffin); 116 Cong. Rec. 17122, 91st Cong. 2d Sess. (1970) (remarks of Sen. Javits).* *See also,* 117 Cong. Rec. 511, 92d Cong. 1st Sess. (1971) (remarks of Rep. Bell indicating that the use of ESAA funds would "range across the educational spectrum"); H. Rep. No. 92-576, p. 3, 92d Cong. 1st Sess. (1970); *Board of Education of the City School District of New York v. Califano,* 584 F. 2d 576, 578 (2d Cir. 1978), *quoting* S. Rep. No. 92-604, 92d Cong. 2d Sess. (1972).

ESAA was considered and enacted during a time of heated debate both in Congress and throughout the nation over how (or even whether) to desegregate all our nation's schools. The focus of the debate was the *de jure-de facto* distinction. *De jure* segregated systems were subject to court ordered desegregation pursuant to this Court's holding in *Brown v. Board of Education,* 347 U.S. 483 (1954). *De facto* segregation, the type of segregation which occurred outside the South, was not actionable. ESAA was conceived as a means of aiding the dual school systems of the South to carry out the mandated desegregation plans while at the same time providing a financial impetus to *de facto* segregated systems to voluntarily desegregate. Thus, ESAA was not intended to *mandate* a change of *status quo.* It is not a civil rights enforcement statute.* ESAA was intended simply to provide the financial means to eradicate school segregation throughout the country, regardless of its "cause or origin." 20 U.S.C. §1602(a).

* Under ESAA, civil rights violations will only result in an applicant's ineligibility for funding (20 U.S.C. §1605(d)) or a cutoff of ESAA funds if the violations are discovered after funding has been provided (45 C.F.R. §185.45). Under Title VI, on the other hand, a violation may trigger the loss of all federal funding.

Representative Dennis stated the purpose of ESAA clearly in deliberations on H.R. 19446, a significant predecessor to the later enacted ESAA statute:

> This bill does not, I will agree, mandate or compel an end to de facto segregation resulting from neighborhood living patterns; but it exercises a powerful influence in that direction by making available massive sums of federal money to assist school corporations, which are willing to develop and submit plans for that purpose, to avoid or minimize such de facto segregation * * *.

116 Cong. Rec. 43141, 91st Cong. 2d Sess. (1970). *See also,* 117 Cong. Rec. 10747, 10749, 92d Cong. 1st Sess. (1971) (remarks of Sen. Pell).

Thus, the intent of Congress in enacting ESAA was to expand eligibility for ESAA funds to the North and South and to encourage the limitation or prevention of minority isolation or segregation wherever it exists. For funding purposes, *de jure-de facto* distinctions were ignored.

(2)

The July 1, 1977 letter (App. 27) of HEW notifying the Board that its 1977-78 ESAA application was denied presented statistics which allegedly demonstrated that teacher assignments in some high schools operated by the Board resulted in their racial identifiability. On the basis of this statistical finding alone, HEW originally contended that the Board was ineligible for ESAA funds under section 1605(d)(1)(B). HEW asserted that the disparate pattern of teacher staffing *per se* constituted a violation of ESAA and that the Board's only grounds for rebuttal would be a showing that HEW's statistics were incorrect.

While agreeing with HEW that the disparate impact test is applicable to determination of ESAA eligibility, the Court of Appeals has apparently adopted a less extreme version of this test than HEW. The Court of Appeals considered, along with HEW's statistics, the Board's rebuttal argument that its policies and practices were racially neutral and that the alleged racial identifiability of schools on the basis of teacher assignment was caused by external factors beyond the Board's control. Nevertheless, the Court of Appeals found the Board's arguments to be inadequate to rebut the *prima facie* showing of discrimination under the disparate impact test and upheld the finding of the Board's ineligibility under section 1605(d)(1)(B). The Board respectfully submits that the plain language of this section and its legislative history does not support a finding that ESAA ineligibility on the basis of discriminatory staff assignments may be established by means of a disparate impact test.

Section 1605(d)(1)(B) provides:

> No educational agency shall be eligible for assistance under this chapter if it has, after June 23, 1972—
>
> • • • •
>
> (B) had in effect any practice, policy, or procedure which results in the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregation or the implementation of any plan or the conduct of any activity described in this section, or otherwise engaged in discrimination based upon race, color, or national origin in the hiring, promotion, or assignment of employees of the agency (or other personnel for whom the agency has any administrative responsibility) • • •.

The reference to any practice or policy which "results in the disproportionate demotion or dismissal" of personnel is the only language in ESAA which ties in a disparate impact test with ESAA eligibility. Significantly, the reference to discriminatory teacher assignments as a ground for ineligibility is not linked to disproportionate result, but rather to actual discrimination. The plain meaning of the section is that purely statistical evidence may result in ineligibility *only* where demotion or dismissal of personnel in conjunction with desegregation activities is in issue.

The analysis of the language contained in section 1605(d)(1)(B) by the Senate Committee on Labor and Public Welfare clearly demonstrates that Congress intended that statistical evidence be determinative of ESAA eligibility only with respect to personnel demotion or dismissal—not personnel assignment. The Committee report noted:

> *Clause* (B) of paragraph (1) [Section 1605(d)(1)(B)] renders ineligible for assistance any local educational agency which has, after the date of enactment of the Act, (1) had in effect any practice, policy, or procedure which results, or has resulted, in the disproportionate demotion or dismissal of instructional or other personnel from minority groups, in conjunction with desegregation of public schools or the establishment of an integrated school, or (2) engaged in discrimination on the basis of race, color, or national origin in the promotion or assignment of employees of the agency, or of other personnel for whom the agency has any administrative responsibility, even though such other personnel are not employees of the agency.
>
> This clause renders ineligible any local educational agency which discriminates in its employment practices, and specifically *presumes one practice* to be dis-

> criminatory: the disproportionate demotion or dismissal of instructional or other personnel from minority groups in conjunction with desegregating its schools or establishing integrated schools.

Sen. Rep. No. 92-61 p. 41, 92d Cong. 1st Sess. (1971) (emphasis added).

Thus, the Senate Committee in considering section 1605 (d)(1)(B) made a significant and conscious distinction between the language of the section which relates to "demotion or dismissal" and that which relates to "hiring, promotion or assignment." The Committee made it clear that one and only one practice—demotion or dismissal in conjunction with desegregation activities—is presumed to be discriminatory if disproportionate or disparate impact exists.* The converse is, therefore, clear. Ineligibility due to staff assignment policies, which are in issue in this case, requires a showing of more than disproportionate or disparate impact. Ineligibility on the basis of staff assignment policies requires actual "discrimination" on the basis of race, color or national origin.

* The remarks of Senator Mondale shed light upon the rationale for the increased concern with demotions and dismissals and the consequent more stringent eligibility standard applied in ESAA:

> [T]here has been wholesale firing of black teachers and principals in the South. No one seems to argue that any more. And as far as I know, very few cases have been brought by the Justice Department. That is a tragedy.
>
> • • • •
>
> There have been allegations by the National Education Association that several thousand black teachers have been fired in the South or demoted. I would like to see lawsuits brought on that.

117 Cong. Rec. 10762, 92d Cong., 1st Sess. (1971). *See also,* 117 Cong. Rec. 11339, 92d Cong., 1st Sess. (1971) (remarks of Sen. Allen.) At this point in the ESAA debates, the attorneys fees provision was under consideration (20 U.S.C. §1617). Senator Mondale viewed the failure of the Department of Justice to take adequate steps to prevent dismissals of black teachers and transfers of property to private segregated schools as a prime reason for including an attorneys fees section in ESAA in order to encourage private enforcement actions.

The word "discrimination" as used in section 1605(d) is not defined in ESAA.* *Board of Education, Cincinnati v. Department of H.E.W.*, 396 F. Supp. 203, 225 (S.D. Ohio 1975), *aff'd in part, rev'd in part on other grounds,* 532 F.2d 1070 (6th Cir. 1976). In the context of ESAA eligibility, however, it has been construed to mean intentional conduct which violates the Equal Protection Clause:

> [D]iscrimination refers to a denial of Equal Protection. It is recognized that school authorities have a constitutional obligation not to engage in discrimination in this sense [*citing Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1, 13 (1971)].
>
> • • • •
>
> Discriminatory acts, then, are those which violate the Constitution, and discrimination is another way of referring to de jure segregation.

Board of Education, Cincinnati v. Department of H.E.W., supra, 396 F.Supp. at 225. *See also, Bradley v. Milliken,* 432

* Nor is it defined in Title VI of the 1964 Civil Rights Act, *Regents of the University of California v. Bakke,* 438 U.S. 265, 286 (1978) (Powell, J.), or Title IV of the 1964 Civil Rights Act. *Board of Education, Cincinnati v. Dept. H.E.W., supra,* 396 F. Supp. at 225. For the purposes of Title VI, it has been construed to mean conduct which violates the Equal Protection Clause. *Regents of the University of California v. Bakke, supra,* 438 U.S. at 287 (Powell, J.), *id.* at 338-340 (Brennan, J.). *See also, Laufman v. Oakley Bldg. & Loan Co.,* 408 F. Supp. 489, 499 (S.D. Ohio 1976) ("discrimination" under Title VI means a denial of equal protection).

F.Supp. 885, 886-887 (E.D. Mich. 1977)*. This construction of the word discrimination is supported by the fact that in 1972, when ESAA was enacted by Congress, discrimination in the context of school segregation meant no less than officially sanctioned, *de jure* segregation. *Swann v. Charlotte-Mecklenburg Board of Education,*** 402 U.S. 1 (1971); *Green v. County School Board,* 391 U.S. 430 (1968); *Brown v. Board of Education,* 347 U.S. 483 (1954). In enacting ESAA, Congress made it clear that it did not intend to change any substantive legal standards as defined by this Court with regard to what constituted actionable segregation:

> • • • H. R. 2266 [House version of proposed ESAA] does not alter in any way the legal aspects of desegregation. Its purpose is to help school districts see that existing law is enforced.

117 Cong. Rec. 38492, 92d Cong. 1st Sess. (1971) (remarks of Rep. Dellenback). *See also,* 117 Cong. Rec. 39112, 92d

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* In *Bradley,* the court found that since no finding of *de jure* segregation with respect to teacher assignments was made, there was no violation of 45 C.F.R. §185.43 (b)(2), and, thus, the Detroit Board of Education should be eligible for ESAA funding.

** *Swann* was decided on April 20, 1971, during the time that the 92d Congress, 1st Session, was debating S. 1557, the proposed ESAA legislation. *See,* 117 Cong. Rec. 10957 (1971) (remarks of Sen. Ervin), *id.* at 10960 (remarks of Sen. Dominick). *Swann* and its companion cases concerned remedying the state imposed dual school systems of the South. The decision in *Swann* prompted a number of senators to criticize this Court for not having ruled on the constitutionality of the *de facto* segregation which occurred outside the South. *See, e.g., id.* at 10956 (remarks of Sen. Mondale). Not until *Keyes v. District No. 1,* 413 U.S. 189 (1973), did this Court rule on the legality of a segregated system outside the South. *Keyes* re-focused the *de jure-de facto* distinction into a question as to whether there is a purpose or intent to discriminate. *Id.* at 208. *See also, Washington v. Davis,* 426 U.S. 229, 240 (1976), and our discussion of *Swann, infra,* at pp. 63-66.

Cong. 1st Sess. (1971) (remarks of Rep. Conyers); 116 Cong. Rec. 42232, 91st Cong. 2d Sess. (1970) (remarks of Rep. Reid). Congress deferred to this Court for the definition of actionable segregation:

> If the Supreme Court • • • at some future time declares purely *de facto* segregation to be unconstitutional—then the Congress will confront a new situation which it must then consider. At this point in time desegregation does not mean mathematical racial balance • • • .

116 Cong. Rec. 43140, 91st Cong. 2d Sess. (1970) (remarks of Rep. Ashbrook). *See also,* 117 Cong. Rec. 38490, 92d Cong. 1st Sess. (1971) (remarks of Rep. Price). Senator Mondale also made the point:

> The Supreme Court said [in *Swann v. Charlotte-Mecklenburg*] that there is a Constitutional remedy and a legal remedy for situations where the races are separated because of official governmental action • • • but there is no such remedy and there is no such Constitutional protection and right as yet where the races are separated for reasons other than official government action.

117 Cong. Rec. 11520, 92d Cong. 1st Sess. (1971). *See also,* 117 Cong. Rec. 11516-11517, 11328-11329, 92d Cong. 1st Sess. (1971) (remarks of Sen. Javits). Thus, Congress was acutely aware that discrimination meant intentional official action in violation of the Equal Protection Clause, and did not intend to advance the definition of discrimination beyond the parameters set by this Court. The use of the word "discrimination" in Section 1605(d)(1)(B), evidences congressional intent that such policies

not be grounds for ineligibility unless they constitute violations of the Equal Protection Clause as construed by *Brown v. Board of Education, supra,* and cases thereafter.

Finally, the legislative debate on ESAA specificially demonstrates that ESAA was not intended to require racial balancing of staff as a prerequisite to eligibility. The following colloquy between Representative Esch and Representative Pucinski, ESAA's sponsor in the House and the Chairman of the Sub-Committee on Education and Labor, which considered ESAA at length, illustrates the point:

> Mr. Esch. I would like to inquire of the gentleman from Illinois, who is chairman of the subcommittee which produced the bill this amendment incorporates, about one critical aspect of eligibility for assistance under this amendment. Will the Secretary be authorized to apply the holding in the Singleton case [*Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969)—which is that you have to have a perfect racial balance in the faculty in every single school in your district]—as a condition or requirement for assistance under this program?
>
> Mr. Pucinski. The answer is absolutely not. As the gentleman knows, this holding has been applied to applications for assistance under the emergency school assistance program—because that program had no requirements spelled out in legislation and the Secretary applied court decisions as eligibility requirements. He could not do so under this amendment because the amendment is very specific in its terms and imposes no such requirement. If it did, very few school districts could qualify. The Secretary will have to apply the eligibility requirements spelled out in this amendment and those do not include racial balancing of faculty and staff in every school.

117 Cong. Rec. 39332, 92d Cong., 1st Sess. (1971).* Accordingly, although statistical evidence may be relevant in determining eligibility under ESAA, statistical disparity in staff assignments cannot be sufficient, without more, to find a local educational agency ineligible for funding.

(3)

The holding of the Court of Appeals that the disparate impact test applied to determinations of ESAA eligibility was primarily based on its reading of 20 U.S.C. § 1602(a).** The Court concluded that section 1602(a)'s language that the guidelines and criteria of ESAA "be applied uniformly * * * without regard to the origin or cause of * * * segrega-

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* Representative Esch's reference to "this amendment" refers to the proposed ESAA in its entirety. ESAA was being considered in the form of an amendment to the Higher Education Act of 1965, Pub. L. 89-329.

** 20 U.S.C. §1602 provides:

Policy with respect to application of certain provisions of Federal law

(a) It is the policy of the United States that guidelines and criteria established pursuant to this chapter shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

(b) It is the policy of the United States that guidelines and criteria established pursuant to title VI of the Civil Rights Act of 1964 and section 182 of the Elementary and Secondary Education Amendments of 1966 shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

tion" (Pet. App. 25; 584 F.2d at 588-589), evidenced Congressional intent that HEW apply a standard stricter than the constitutional intent test to determinations of ESAA eligibility. The Board respectfully submits that in so holding, the Court of Appeals misconstrued the intent of Congress in adopting this provision.

As discussed previously (*supra*, at p. 23) for the purposes of funding educational agencies, the distinction between *de jure* and *de facto* segregation was erased in ESAA. That is, where the ESAA applicant had a court ordered or HEW approved plan or a voluntary plan for the elimination of segregated conditions in its elementary or secondary public schools, ESAA funding was available. 20 U.S.C. § 1605. So long as the plan met the statutory prerequisites for funding, it was not relevant whether the segregated condition had been brought about by *de jure*, official governmental acts, or by *de facto*, non-official causes such as voluntary housing patterns.* Thus, in this sense, ESAA erases the distinction between *de jure* and *de facto* discrimination:

> This measure • • • does away with the distinction between de facto and de jure; it says to the North and South you have problems which must be dealt with; and it provides a mechanism for a local educational agency to alleviate those problems.

117 Cong. Rec. 10747, 92d Cong. 1st Sess. (1971) (remarks of Sen. Pell). *See also*, 117 Cong. Rec. 10762, 92d Cong. 1st Sess. (1971) (remarks of Sen. Mondale).

* It should be noted that Congress recognized that much of so-called *de facto* segregation was bottomed on intentional discriminatory governmental policies. *See, e.g.*, 117 Cong. Rec. 10763, 92d Cong. 1st Sess. (1971) (remarks of Sen. Mondale); *id.* at 11511-12 (remarks of Sen. Eastland).

Within this context, it is apparent that the policy statement contained in section 1602(a) is not intended to restrict eligibility for ESAA funding. Instead, this provision simply proclaims as a statement of policy that ESAA funding is available to all segregated school systems attempting (voluntarily or otherwise) to desegregate, notwithstanding whether their segregated conditions were caused by official or non-official factors. HEW's reading of this provision, as adopted by the Court of Appeals, that section 1602(a) is intended to apply the restrictive disparate impact test to ESAA eligibility determinations, is thus inconsistent with both the plain meaning of this section and the underlying purpose of ESAA.

Moreover, examination of the history of the Senate's version of ESAA, the "Emergency School Aid and Quality Integrated Education Act of 1971", S. 1557, 92d Cong. 1st Sess. (1971), indicates that the Court of Appeals' reliance on section 1602(a) was misplaced. Senate 1557 was amended on April 22, 1971, to include a policy statement commonly known as the "Stennis amendment." *See*, 117 Cong. Rec. 11520, 92d Cong. 1st Sess. (1971). This amendment included the language that now comprises both sections 1602(a) and 1602(b), and thus the history of this amendment is relevant to section 1602(a).* The Stennis amendment provided:

> *Policy with respect to the application of certain provisions of Federal Law*
>
> Sec. 2. It is the policy of the United States that the guidelines and criteria established pursuant to Title VI

* The language found in section 1602(a) had its origin in H.R. 10338 (§2 (a)(B)), 92d Cong. 1st Sess. 1971), a version of ESAA proposed by Representative William Ford. *See*, 117 Cong. Rec. 29185-86, 92d Cong. 1st Sess. (1971). Neither the House debates nor the House report on ESAA (H. Rep. 92-576, 92d Cong. 1st Sess. (1971)), shed light on the effect to be accorded this language.

> of the Civil Rights Act of 1964, Section 182, of the Elementary and Secondary Education Amendments of 1966 *and this Act*, shall be applied uniformly in all regions of the United States in dealing with conditions of segregation by race whether de jure or de facto in the schools of the local educational agencies of any State without regard to the origin or cause of such segregation.

117 Cong. Rec. 11508, 92d Cong. 1st Sess. (1971) (emphasis added).*

The inclusion of a policy statement in ESAA that the guidelines and policy of ESAA and Title VI of the 1964 Civil Rights Act shall be applied uniformly without regard to the cause or origin of segregation, stemmed from the view of some southern senators, as well as some northerners, that school desegregation was a burden unfairly imposed only on southern states. Senator Stennis and his supporters complained that due to the *de jure* origins of segregated conditions in the South, under *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny, only southern school systems were forced to undergo desegregation. They asserted that northern school districts, many of which were just as segregated as their southern counterparts, were immune from court or administrative mandated desegregation due to the *de facto* nature of their segregated schools. For example, Senator Stennis stated:

> The States in the South are being vigorously prosecuted and pursued by both the executive and judicial departments of the Federal Government, with drastic and effective demands for total integration of the races in our public school systems. At the same time, even though segregation in public schools exists on a very large scale in extensive areas outside the South —and in many instances on a much larger scale than in the South—these schools outside the South have a virtual immunity from demands for desegregation of the races.

116 Cong. Rec. 14098, 91st Cong. 2d Sess., (1970). *See also*, 117 Cong. Rec. 11508-9, 92d Cong., 1st Sess. (1971) (remarks of Sen. Stennis); 118 Cong. Rec. 5176-77, 92d Cong. 2d Sess. (1972) (remarks of Sen. Allen); 117 Cong. Rec. 11511-2, 92d Cong. 1st Sess. (1971) (remarks of Sen. Eastland); *id.* at 11510, (remarks of Sen. Tower); *id.* at 10960, (remarks of Sen. Ribicoff). It was, thus, the concern of Senator Stennis and his supporters that some steps be taken to develop a uniform nationwide policy with respect to school desegregation. This policy was embodied in the Stennis amendment.

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* Since the House version of ESAA contained only the section 1602(a) language, and the Senate version contained a provision incorporating the language of both sections 1602(a) and (b), the House-Senate Conference Committee chose to delete the reference to "this act" from the Senate version and include both policy statements in the final bill. Conference Report No. 798, 92d Cong. 2d Sess. (1972), *reprinted in* 1972 U.S. Code Congressional and Administrative News at 2663. Debates following the submission of the conference report to the Senate demonstrate the applicability of the Senate debates on the Stennis amendment to the relevant language of section 1602(a):

> The amendment offered by the junior Senator from Mississippi (Mr. Stennis) has been brought back unchanged in spite of great opposition on the part of the House. Indeed to assuage the House we also include their version of the Stennis amendment. Some would ask why we did this. In answer, the House amendment covered only the emergency school aid provision itself, while the Senate amendment also covered title VI of the Civil Rights Act and Section 182 of the Elementary and Secondary Education Amendments of 1966. Here we have the agreeable option of taking one provision from each bill to accomplish the same end.

118 Cong. Rec. 18438, 92d Cong. 2d Sess. (1972) (remarks of Sen. Pell).

The language contained in the Stennis amendment was conceived as a broad statement of policy, intended only to encourage the executive branch of government to seek the application of Federal desegregation efforts to *de facto* segregated school districts:

> All my amendment says is that it is the policy of the legislative branch that this operation [desegregation] • • • shall be applied throughout the Nation in the same way, whether the history is de facto, so called, or de jure, so called.

117 Cong. Rec. 11508, 92d Cong. 1st Sess. (1971) (remarks of Sen. Stennis).

Senator Stennis went on to say:

> What is the matter with this proposal? Why should not Congress light just one little lamp that might shed some light whereby the officials could find their way? I believe there has been so little activity beyond the South, and so many years have passed and so many promises have been made, that somewhere down the line there should be a slowdown signal, and I think Congress is one branch of Government that at least can light that little candle. It is very small. Some say this proposal does not have any meaning.
> Well, if it does not have any meaning, it will do no harm. But I think it does have meaning. I think there is a great principle behind it.
>
> • • • •
>
> [The Stennis Amendment] does not set any time table. It does not call for any drastic action. It just says that the policy applied by HEW ought to be nationwide.

Id. at 11509.

It is apparent that Senator Stennis saw his amendment to S. 1557 as constituting a broad message to the executive branch of government that it was time to move against *de facto* segregation. But there is nothing to indicate he intended to incorporate substantive legal standards with respect to ESAA eligibility, as the Court of Appeals concluded. Even Senator Ribicoff, the Senate's principal proponent of comprehensive legislation to achieve nationwide desegregation,* and a supporter of the Stennis Amendment, indicated that the Stennis Amendment was devoid of substantive legal standards:

> Some argued last year that the Stennis Amendment was only a declaration of policy and did not implement any affirmative program in the North. Many of these same Senators yesterday voted against a program that would implement this declaration of policy and begin for the first time a program of school integration in the North. Nonetheless, I continue to support the Stennis amendment for I feel it is critical for the Senate to declare at least a policy of ending segregation in the North as well as the South.
>
> • • • •
>
> The question is what are we going to do about this crisis? The amendment proposed by the Senator from Mississippi would at least declare a policy of integration in the North as well as the South. This would be

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* Senator Ribicoff was the sponsor of an amendment to ESAA (*see*, 117 Cong. Rec. 10747, 92d Cong. 1st Sess. (1971)), and the "Urban Education Improvement Act of 1971," S. 1283, 92d Cong. 1st Sess. (1971), which would have required nation-wide school desegregation on a metropolitan-wide basis. Both his amendment to ESAA and the bill were defeated.

> a small but still significant step forward and I will vote for his amendment.

117 Cong. Rec. 11511, 92d Cong. 1st Sess. (1971).*

The lack of substantive standards in the Stennis amendment is further demonstrated by the remarks of those senators who opposed its adoption. In fact, the basis for the opposition to Senator Stennis' proposal was that it enunciated a policy with respect to eradicating *de facto* segregation that could not be effectuated by substantive law. The amendment's provision that ESAA, Title VI and the Education Amendments of 1966 be applied uniformly throughout the United States led to the fear among the Stennis amendment's opponents that if *de facto* discrimination could not be acted upon, the policy of uniformity could prevent further challenges to *de jure* discrimination. Senator Mondale, a key supporter of ESAA, stated in this regard:

> What causes me to oppose the amendment of the Senator from Mississippi knowing, as I do, the good faith in which it is offered—is that I think it would be used to argue that until you can find a remedy for a situation for which there is no remedy today [*de facto* segregation], under present Supreme Court decisions, you should lay off law enforcement in situations of official discrimination, throughout the Nation, where there is both a duty and a remedy to correct the separation of the races.

* Senator Ribicoff's reference to the consideration of the Stennis amendment "last year" refers to its inclusion in the Elementary and Secondary Education Act of 1970, P.L. 91-230, 42 U.S.C. §2000d-6. The reference to the vote against a program which would "implement" the Stennis amendment refers to the defeat of his proposals discussed above.

117 Cong. Rec. 11519, 92d Cong. 1st Sess. (1971). *See also, id.* at 10760-61, 11517.

Senator Javits, a major proponent of the ESAA legislation, in his criticism of the Stennis amendment echoed Senator Mondale's concerns that the amendment might inhibit school desegregation efforts. 117 Cong. Rec. 11514-11516, 92d Cong. 1st Sess. (1971). Most significantly, however, his problems with the Stennis amendment did not extend to that portion of it addressed to applying ESAA's criteria and guidelines uniformly without regard to the cause or origin of segregation, and presently embodied in section 1602(a). He viewed this language merely as expressing ESAA's purpose of funding school districts attempting to eradicate both *de jure* and *de facto* segregation:

> Again, the amendment of the Senator from Mississippi is not confined to this act, I would say to him, if he had confined his amendment to this act, I could have a rather different attitude toward it because in this act for $1.5 billion we are trying to do everything we can about both kinds of segregation.

117 Cong. Rec. 11516, 92d Cong. 1st Sess. (1971.)*

In Senator Javits' view, the uniform policy pronounced in the language now comprising section 1602(a) was not objectionable. What was objectionable to him was requiring the application of a uniform policy with respect to Title VI where there were no substantial legal standards at that time that would permit a uniform policy concerning *de jure* and *de facto* segregation to exist. *Id.*

* Senator Mondale's initial remarks on the Stennis amendment reveal that he, like Senator Javits, primarily objected to the reference to Title VI and the Education Amendments of 1966 in the amendment. *See,* 117 Cong. Rec. 10760-10761, 92d Cong. 1st Sess. (1971).

This review of the history of the Stennis amendment demonstrates that neither the proponents nor the opponents of this proposal in the Senate saw the predecessor to section 1602(a) and (b) as containing legal standards which would justify HEW adopting the restrictive disparate impact test for ESAA eligibility. Sections 1602(a) and (b) are reflections of Congress' grave concern over school desegregation efforts as well as its hesitancy to take comprehensive and decisive action to chart its course. *See,* 117 Cong. Rec. 10949, 92d Cong. 1st Sess. (1971) (remarks of Sen. Ribicoff); 116 Cong. Rec. 14098, 91st Cong. 2d Sess. (1970) (remarks of Sen. Stennis). Neither provision, but especially not section 1602(a), is addressed to the conditions of ESAA eligibility. Thus, the reliance by the Court of Appeals on section 1602(a) as the basis for holding that "Congress intended to permit grant disqualification not only for purposeful discrimination but also for discrimination evidenced simply by an unjustified disparity in staff assignments" (Pet. App. 25; 584 F. 2d at 588) is without support in the language of the statute or its legislative history.

B. *The relationship between ESAA and Title VI of the 1964 Civil Rights Act.**

(1)

The Court of Appeals relied on Title VI as an additional basis for its holding that a disparate impact test is applicable to determinations of ESAA eligibility. The Court

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* Pub. L. No. 88-352, Title VI, §§ 601-605, 78 Stat. 253 (1964). Section 601, 42 U.S.C. § 2000d, provides:

> *Nondiscrimination in federally assisted programs*
>
> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

held that discrimination under Title VI may be demonstrated by disparate impact and that ESAA incorporates the same standard:

> Moreover the ESAA proscription against employment discrimination forbids discriminatory acts and practices which violate statutory civil rights provisions such as Title VI of the Civil Rights Act of 1964.

Pet. App. 25; 584 F. 2d at 589.

While the Board disagrees with the Court of Appeals' holding in this case that ESAA creates an independent justification for HEW's determination of ineligibility, it does agree with the Court of Appeals that ESAA's standards for determining eligibility for funding in this case are co-extensive with the standards for determining racial discrimination under Title VI.

Title VI was designed to police Federal funding programs in order to insure that local agencies and institutions do not use the Federal largesse to further racially discriminatory activities. *Regents of the University of California v. Bakke,* 438 U.S. 265, 284 (1978) (Powell, J.). As stated by the House Judiciary Committee,

> This title [Title VI] declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy.

House Rep. No. 914, 88th Cong. 1st Sess. (1963), *reprinted in* 1964 U.S. Code Cong. and Ad. News, 2391 at 2400. *See*

also, 110 Cong. Rec. 6544, 88th Cong. 2d Sess. (1964) (remarks of Sen. Humphrey).

Nowhere is Title VI's enforcement role more evident than in Federal programs designed to fund local educational agencies. Section 182 of the 1966 Amendments to the Elementary and Secondary Education Act of 1964,* the enactment that provides the New York City Board of Education with more than one-half of all its Federal reimbursement funding,** was actually codified as an addition to Title VI (*i.e.,* 42 U.S.C. §2000d-5). Section 182 provides for the application of various procedural rights to local educational agencies found to be in violation of Title VI and thus threatened with a denial of funding under this major program.

ESAA is cut from the same mold. The statute and implementing regulations provide that ESAA eligibility may be predicated on a plan for desegregation approved by HEW under Title VI. 20 U.S.C. 1605(a)(1); 45 C.F.R. §185. 11(a)(2). Indeed, at least two Federal court decisions support the link between ESAA and Title VI. *Bradley v. Milliken,* 432 F. Supp. 885 (E.D. Mich. 1977); *Robinson v. Vollert,* 411 F. Supp. 461 (S.D. Tex. 1976). It was held in *Bradley* that:

> ESAA does not enhance HEW's power to apply eligibility criteria above and beyond Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.

432 F. Supp. at 887. In so holding, the court in *Bradley* relied on *Robinson,* where the issue was whether ESAA permitted HEW to review the sufficiency of a Federal court

* P.L. 89-750 §182, 80 Stat. 1209

** By comparison, the $3.5 million in contested ESAA funds amount to less than 5% of the Board's 1977 Federal reimbursement funding.

desegregation order in determining whether ESAA's eligibility requirements had been met. After a review of ESAA's legislative history in a futile attempt to identify the relevant congressional intent, the court turned to Title VI for guidance. Title VI, the court in *Robinson* found, is "intimately related" to ESAA and therefore the rule under Title VI would apply to ESAA as well. *Robinson v. Vollert, supra,* 411 F. Supp. at 475.

Support for the link between the ESAA and Title VI is further found in ESAA's legislative history. During the hearings on the proposed ESAA before the Senate Committee on Labor and Public Welfare, Senator Mondale asked Secretary Finch of HEW whether a school district which was racially discriminating in the assignment of teachers would be eligible for ESAA funds. Secretary Finch replied that the district would not be eligible because it would not meet the requirements of Title VI. *Hearings on S. 3883 Before the Senate Committee on Labor and Public Welfare,* 91st Cong. 2d Sess. at 58 (1970). Similarly, Representative Hawkins remarked,

> Administratively title VI of our Civil Rights Act has not been used in the vigorous and decisive manner we intended. For the first time, H.R. 19446 [proposed ESAA of 1970] would give us a specific program of desegregation with the financial aid needed to obtain results and with criteria to measure enforcement.

116 Cong. Rec. 43141, 91st Cong. 2d Sess. (1970).

Thus, the Court of Appeals was correct in looking to Title VI for the definition of discrimination.* Its error, however, was in its analysis of Title VI. Title VI incor-

* Significantly, in the instant case, the determination of ESAA ineligibility was based, in large part, on the 1976 Title VI compliance investigation conducted by the HEW Office of Civil Rights. (App. 7, 28, 29; Pet. App. 19; 584 F.2d at 585-586).

porates a constitutional test for determining what constitutes discrimination.

C. *The test for discrimination under Title VI.*

Until this Court's recent landmark decision in *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), the test for determining racial discrimination under Title VI, while disputed, appeared to be the disparate impact test. *Lau v. Nichols,* 414 U.S. 563, 568 (1974).* In *Lau,* this

* In *Lau,* plaintiffs, non-English speaking Chinese students, brought a class action against the San Francisco Unified School District under the 14th Amendment and Title VI alleging unequal educational opportunities in that they were denied a bilingual education. Both the District Court and the Court of Appeals (483 F.2d 791 (9th Cir. 1973)) denied relief under the Constitution and Title VI. The Court of Appeals in essence held that the inherent disabilities of the students were not to be attributed to the school system. This Court, in not reaching the constitutional issue, held under Title VI that "[d]iscrimination is barred which has that effect even though no purposeful design is present * * *." 414 U.S. at 568.

There is judicial authority prior to and after *Lau* to support the proposition that "the same showing is required to establish a violation of 42 U.S.C. 2000d (Title VI), as is required to make out a racial discrimination violation of the Fourteenth Amendment's Equal Protection Clause." *Goodwin v. Wyman,* 330 F. Supp. 1038, 1040 n.3 (S.D.N.Y. 1971), *aff'd* 406 U.S. 964 (1972); *Gilliam v. City of Omaha,* 388 F. Supp. 842, 847 (D. Neb. 1975), *aff'd* 524 F. 2d 1013 (8th Cir. 1975); *Ward v. Winstead,* 314 F. Supp. 1225, 1235 (N.D. Miss. 1970) *appeal dismissed,* 400 U.S. 1019 (1971). *See also, Jefferson v. Hackney,* 406 U.S. 535, 549-550 n. 19 (1972) (where an intent test applicable to Title VI may be implied); *Bossier Parish School Board v. Lemon,* 370 F. 2d 847 (5th Cir. 1967), *cert. denied* 388 U.S. 911 (1975); *Taylor v. Cohen,* 405 F.2d 277, 281 (4th Cir. 1968); *United States v. Tatum Independent School Dist.,* 306 F. Supp. 285, 288 (E.D. Tex. 1969) *aff'd* 447 F.2d 441 (5th Cir. 1971); *United States v. State of Texas,* 321 F. Supp. 1043, 1056-57 (E.D. Texas 1970); *NAACP Western Region v. Brennan,* 360 F. Supp. 1006, 1012 (D.D.C. 1973); *Association of Gen. Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 968 (C.D. Calif. 1977), *judgment vacated* —— U.S. ——, 98 S. Ct. 3132, 3133 (1978).

After *Lau,* a number of Federal courts have held that the disparate impact test is applicable to Title VI. *See, e.g., Serna v. Portales Municipal Schools,* 499 F.2d 1147 (10th Cir. 1974); *Lora v. Board of Education,* 456 F.Supp. 1211 (E.D.N.Y. 1978); *Child v. Beame,* 425 F. Supp. 194 (S.D.N.Y. 1977).

Court indicated that under some circumstances a cause of action under Title VI could be established in the absence of evidence of purposeful and intentional discrimination. Where statistical evidence revealed that programs receiving Federal funds had an adverse effect on a particular racial group, this would be sufficient to support a *prima facie* finding of racial discrimination under Title VI. *Lau's* approach to Title VI was altered, however, by this Court's decision in *Bakke. Bakke* establishes that the constitutional or purposeful intent standard is the correct standard for determining whether discrimination in violation of Title VI has taken place.

In *Bakke,* this Court was faced with the question of whether a state university's special admission program for disadvantaged racial minority students violated the Equal Protection Clause of the Fourteenth Amendment and Title VI. A threshold question considered by Justice Powell was whether the standard for determining racial discrimination under Title VI differed from the standard for determining racial discrimination under the Constitution. After reviewing the congressional debates on Title VI, Justice Powell concluded that "[f]urther evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term 'discrimination.'" *Bakke, supra,* 438 U.S. at 286. *See also, id.* at 284-5 (Powell, J.). Justice Powell then held that, "[i]n view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Id.* at 287. Similarly, in an opinion in which Justices White, Marshall and Blackmun joined, Justice Brennan stated:

> In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies***.

Id. at 328. Justice Brennan proceeded to reinforce this interpretation of Title VI and in the process to cast grave doubt on the continued viability of *Lau v. Nichols*:

> Since we are now of the opinion, for the reasons set forth above, that Title VI's standard * * * is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision [*Lau*].
>
> However, even accepting *Lau's* implication that impact alone is in some contexts sufficient to establish a prima facie violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent in the least.

438 U.S. at 352-353. *See also, id.* at 385 (White, J.) and *id.* at 402 (Blackmun, J.). Clearly, a majority of this Court in *Bakke* has established that Title VI's standard for determining racial discrimination is coextensive with the standards of the Equal Protection Clause of the Fourteenth Amendment.

(2)

The legislative history of Title VI clearly supports this view. Title VI is a product of Congress' concern over the unacceptably slow pace of desegregation required by *Brown v. Board of Education*, 347 U.S. 483 (1954). The focus of Congress' concern in enacting Title VI was to prevent the disbursement of Federal funds to recipients who were acting in a manner which violates the Equal Protection Clause, or, in the case of a private recipient, would violate the Equal Protection Clause if done by the state. In introducing Title VI in the House, Representative Celler,

the chairman of the Judiciary Committee and floor manager of the Civil Rights legislation, stated:

> It would assure Negroes the benefits now accorded only white students in programs of high education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association.

110 Cong. Rec. 1519, 88th Cong. 2d Sess. (1964). He later stated:

> In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money and other kinds of financial aid. It seems rather shocking, moreover, that while we have on the one hand the 14th amendment, which is supposed to do away with discrimination since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination.
>
> It is for these reasons that we bring forth title VI. The enactment of title VI, will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions.*

Id. at 2467.**

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* *See, e.g.*, the Hill Burton Act, former 42 U.S.C. § 291e(f) (1958).

** Representative Celler also filed a memorandum discussing the proposed Civil Rights Act. 110 Cong. Rec. 1251, 88th Cong. 2d Sess. (1964). In that memorandum it was urged that the Constitution mandated that the government prevent racial discrimination by the recipients of Federal aid; otherwise the government might become a partner in discrimination. *Id.* at 1527-1528. As stated in

These remarks and those of other supporters of the House bill establish that Title VI was introduced to clarify for all recipients of Federal grants-in-aid that the Fifth and Fourteenth Amendments prohibit discrimination in such programs. *See,* 110 Cong. Rec. 2467, 88th Cong. 2d Sess. (1964) (remarks of Rep. Lindsey); *id.* at 2481 (remarks of Rep. Ryan). *See generally, Hearings on H.R. 6890, 87th Cong. 2d Sess. before the Subcommittee on Integration in Federally Assisted Public Education Programs of the House Committee on Education and Labor,* at 14-15, 18, 20, 21, 32, 37-38.

The Senate debates on Title VI further demonstrate that Title VI was intended to do no more than authorize termination of Federal funding where recipients engage in conduct prohibited by the Equal Protection Clause. For example, Senator Ribicoff stated:

> Basically, there is a constitutional restriction against discrimination in the use of Federal funds and title VI simply spells out the procedure to be used in enforcing that restriction.
>
> • • • •
>
> Title VI implements these basic principles. It provides a fair and reasonable procedure for making sure that the Constitution is observed and for making sure that discrimination in the use of Federal funds is ended.

110 Cong. Rec. 13333, 88th Cong. 2d Sess. (1964). *See also, id.* at 7102. Similarly, Senator Humphrey stated:

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the memorandum, "• • • Congress clearly has the power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution." *Id.*

> The existing law of the land is stated in section 601 [42 U.S.C. § 2000d]. Sections 602 and 603 [42 U.S.C. § 2000d-2 and § 2000d-3] of H.R. 7152 do not represent an extension of that law. Those latter sections represent no new power.

110 Cong. Rec. 5254, 88th Cong. 2d Sess. (1964). He then went on to state:

> So what does section 601 do? It states the law, it repeats the law • • •.

Id. See also, id. at 5252, 5865, 13442 (remarks of Sen. Humphrey).

The colloquy between Senators Pell and Pastore also provides evidence that Title VI was not intended to provide any rights other than those already established under the Equal Protection Clause:

> Mr. Pell: Is it not true that the philosophy of title VI is already in the law? The authority is permissive. Title VI would merely extend it, but would not bring in a new concept. Is that correct?
>
> Mr. Pastore: The Senator is correct.

110 Cong. Rec. 7064, 88th Cong. 2d Sess. (1964).*

In enacting Title VI, Congress was concerned with giving effect to the constitutional prohibitions against discrimination. The doctrines set forth in this Court's decision in *Brown v. Board of Education* had yet to be realized, and Congress saw Title VI as a means to reaffirm *Brown's* principles and to effectuate its mandate. No new standard more

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* *See also, id.* at 7102 ("title VI does not create any new legal or administrative powers") (remarks of Sen. Javits); *id.* at 7057, 7062 (remarks of Sen. Pastore); *id.* at 12675, 12677 (remarks of Sen. Allott); *id.* at 13333 (remarks of Sen. Morse).

stringent than those required by the Equal Protection Clause were intended.*

(3)

Despite this Court's in depth analysis of Title VI in *Bakke,* the Court of Appeals totally ignored *Bakke* in holding that the disparate impact test applies to Title VI and ESAA eligibility.**

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* Further support for the view that Congress did not intend Title VI to prohibit conduct other than that prohibited by the Equal Protection Clause may be found by reference to Title IV of the 1964 Civil Rights Act. 42 U.S.C. 2000c *et seq.* Section 2000c-6 authorizes the Attorney General to bring civil actions in district court to compel school desegregation, and provides in pertinent part:

> * * * nothing herein shall * * * enlarge the existing power of the court(s) to insure compliance with constitutional standards.

In *Swann v. Charlotte Mecklenburg Board of Education,* 402 U.S. 1 (1971), this Court interpreted Title IV, as follows:

> On their face, [42 U.S.C. §§2000c(b), 2000c-6] purport only to insure that Title IV of the Civil Rights Act of 1964 will not be read as granting new powers. The provision in §2000c-6 is in terms designed to foreclose any interpretation of the Act as expanding the *existing* powers of federal courts to enforce the Equal Protection Clause.

Id. at 17 (emphasis in original). Clearly, if when enacting these provisions of Title IV it was Congress' intent to insure that constitutional standards in school desegregation cases would not be exceeded, Congress could not have intended for Title VI, enacted on the same day, to be used in school discrimination cases as a way of expanding the Federal role in combating segregation. *Parents Association of Andrew Jackson High School v. Ambach,* Slip Op. 2225, 2244-2245 (2d Cir. April 17, 1979).

** On the other hand, the Court of Appeals did specifically cite *Bakke's* apparent approval of a disparate impact test under Title VII of the 1964 Civil Rights Act. Pet. App. 24-25; 584 F.2d at 588 n. 39. Ironically, in a case decided by the Court of Appeals shortly after the instant case, *Fullilove v. Kreps,* 584 F. 2d 600 (2d Cir. 1978), the same panel that decided the instant case concluded that *Bakke* held that " 'Title VI goes no further in prohibiting the use of race than the equal protection clause of the Fourteenth Amendment itself.' " *Id.* at 608 n. 15, *citing Regents of University of California v. Bakke,* 438 U.S. at 325, 98 S. Ct. at 2767 (Brennan, J.); *id.* at 438 U.S. at 287, 98 S. Ct. at 2747 (Powell, J.).

However, in a very recent decision, a different panel of the Court of Appeals for the Second Circuit has apparently reconsidered Judge Oakes' decision in the instant case concerning the applicable test for discrimination under Title VI. In *Parents Association of Andrew Jackson High School v. Ambach ("Jackson"),* Slip op. at 2225 (2nd Cir. April 17, 1979), a class action for injunctive relief under 42 U.S.C. §1983 and 42 U.S.C. §2000d, brought by minority parents to desegregate a high school in New York City, the Court of Appeals discussed the Title VI test for discrimination:

> Plaintiffs urge, nevertheless, that a desegregation order may be predicated upon the Civil Rights Act of 1964, arguing that under Title VI, 42 U.S.C. §2000d, segregation *effects* alone without discriminatory intent, establish a prima facie violation. We think, however, that Title VI does not authorize federal judges to impose a school desegregation remedy where there is no *constitutional* transgression—*i.e.,* where a racial imbalance is merely *de facto.*

Slip op. at 2244 (emphasis in original). The court, citing *Swann v. Charlotte Mecklenburg Board of Education, supra,* 402 U.S. at 17, held that an action to desegregate schools under Title VI would not lie "without a showing of *de jure* discrimination * * *." *Id.* at 2245 (emphasis in original). In so holding, the Court of Appeals noted Justice Powell's conclusion in *Bakke* that Title VI proscribes only those racial classifications that would violate the Fourteenth Amendment. The Court found that Justice Powell and "[f]our other Justices * * * also apparently rejected the implication of *Lau v. Nichols,* 414 U.S. 563 (1974)) that impact alone, without discriminatory intent, is, in some contexts, sufficient to establish a prima facie violation of Title VI" and held that " 'Title VI's

standard * * * is no broader than the Constitution's * * *.'" Slip op. at 2245, *citing Bakke, supra,* 438 U.S. at 352. The Court of Appeals conceded that while *Lau* was not expressly overruled in *Bakke,* "further word from the Supreme Court on [*Lau's*] vitality as precedent" was necessary. Slip op. at 2246.

The Court of Appeals, noting the pendency of the instant case in this Court, observed that the court below "did not expressly consider the impact of the *Bakke* opinion on the continued authority of *Lau v. Nichols.*" *Id.* The Court of Appeals in *Jackson* concluded, however, that Judge Oakes' opinion in this case might still have continued vitality since it found that the instant case "examined Title VI standards in the context of claims of teacher *employment* discrimination, and the court accordingly drew an analogy to the standards applicable under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e *et seq.*" *Id.* (emphasis in original). The *Jackson* court then stated that had the instant case been analogous of Title IV of the 1964 Civil Rights Act, 42 U.S.C. 2000c *et seq., i.e.,* a desegregation case like *Jackson,* then a constitutional intent standard would have applied. Slip Op. at 2246.

It is respectfully submitted that this attempt by the *Jackson* court to distinguish the instant case, and in doing so to introduce a bifurated analysis under Title VI, is incorrect. *Jackson* was itself correctly decided, in accordance with what we have here argued was the intent of Congress in enacting Title VI. And that intent should as much govern here as it did in *Jackson.* The Court of Appeals in *Jackson* was incorrect in suggesting that this case could somehow be properly viewed as an employment discrimination case governed by Title VII standards. The issue of racial identifiability of schools due to staff assignments was never raised in the instant case in the context of

employment discrimination (Title VII).* The question in this case is whether the Board has assigned staff "in such a manner as to identify any * * * schools as intended for students of a particular race * * *." 45 C.F.R. §185.43(b)(2). At issue, therefore, is school segregation—not employment discrimination. Indeed, Judge Oakes' references to Title VII in this case were merely by example or analogy to establish that other titles of the Civil Rights Act of 1964, such as Title VII, incorporated a disparate impact standard, and therefore it was conceivable that Title VI might contain a similar standard. Pet. App. 23-25; 584 F. 2d at 588 (text and n. 39). Thus, the *Jackson* court's finding that Judge Oakes' opinion had examined Title VI in the context of employment discrimination as a justification for the failure of the court below to consider *Bakke's* impact on *Lau* is totally without merit.

The bifurcated view of Title VI adopted in *Jackson,* presumably out of deference to the panel which decided this case, was not essential to the result reached in *Jackson.*

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* Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e, provides in pertinent part:

> Discrimination because of race, color, religion, sex, or national origin
>
> (a) Employers. It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or priviliges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Indeed, it seems obvious that the *Jackson* court wished to avoid the implication of Judge Oakes' opinion for that case. But it bears noting that adoption of such a bifurcated analysis would result in the Title VI standard of discrimination varying from case to case, depending on the particular analogy seized upon by the reviewing court (*i.e.*, employment discrimination versus school segregation). This defies logic and is contrary to this Court's Title VI analysis in *Bakke*. Furthermore, the bifurcation of Title VI is antithetical to the intent of Congress in enacting this provision. Senator Humphrey, a dominant force in the enactment of the Civil Rights Act of 1964, stated:

> Many of us have argued that the issue of nondiscrimination should be handled in an overall, consistent way for all Federal programs, rather than piecemeal, and that it should be considered separately from the merits of particular programs of aid to education, health, and the like. This bill gives the Congress an opportunity to settle the issue of discrimination once and for all, in a uniform, across-the-board manner, and thereby to avoid having to debate the issue in piecemeal fashion every time any one of these Federal assistance programs is before the Congress.

110 Cong. Rec. 6544, 88th Cong. 2d Sess. (1964).

The legislative history of this statute and the controlling decisional law construing it leave no room for the Courts at this late date to bifurcate the standard for determining discrimination under Title VI. Title VI contains one standard for determining discrimination; it is the very same standard as that required to make out a finding of violation of the Equal Protection Clause.

II

HEW failed to establish that the Board's teacher assignment policies constituted intentional discrimination.

(1)

This Court has clearly established that disproportionate impact alone, without proof of intentional of purposeful discrimination, is insufficient to support a finding of a violation of the Equal Protection Clause of the Fourteenth Amendment. *Dayton v. Brinkman,* 433 U.S. 406 (1977); *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977); *Washington v. Davis,* 426 U.S. 229 (1976); *Keyes v. School Dist. No. 1, Denver, Colorado,* 413 U.S. 189 (1973).

In *Keyes v. School District No. 1,* this Court in ruling on a claim of alleged unconstitutional segregation in a northern school system held:

> • • • in the case of a school system like Denver's where no statutory dual system has ever existed, plaintiffs must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional state action.

413 U.S. at 198. The importance of the *Keyes* decision lies in the distinction the Court made between *de jure* and *de facto* segregation. Only intentional, *de jure,* segregation was held to be sufficient to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment.

In *Washington v. Davis,* 426 U.S. 229 (1976), this Court reaffirmed *Keyes* and conclusively put an end to the use of an impact inquiry as a substitute for a finding of actual discriminatory purpose or intent: "[d]isproportionate im-

pact is not irrelevant, but it is not the sole touchstone of invidious racial discrimination forbidden by the Constitution." *Id.* at 242. This Court stated that in school desegregation cases "the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

The following year this Court once again focused on this impact/intent distinction and held that the relatively greater adverse impact on minorities caused by a village's refusal to rezone an area for low and moderate income housing did not, absent proof "that discriminatory purpose was a motivating factor in the Village's decision," violate the Equal Protection Clause. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 270 (1977). *Arlington Heights* establishes that determining that invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into circumstantial and direct evidence of intent. It suggested the following guides to analysis before reaching that determination: (1) the impact of the official action on race is a relevant starting point and may be conclusive in some cases where the pattern is stark [*citing Yick Wo v. Hopkins*, 118 U.S. 356 (1886) and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)]; (2) the historical background of the policy is a factor especially if it reveals a series of official actions taken for invidious purpose; (3) the specific sequence of events leading up to the alleged policy or practice at issue with special note to departures from normal procedural sequence; (4) the legislative or administrative history is a relevant factor. 429 U.S. at 265.

Most recently in *Dayton v. Brinkman*, 433 U.S. 406 (1977), this Court reaffirmed *Arlington Heights* and *Davis* in a school desegregation case. *Dayton* held:

> The duty of both the District Court and the Court of Appeals * * * is to first determine whether there was any action in the conduct of the business of the school board which was intended to and which did in fact discriminate against minority pupils, teachers and staff.

Id., at 420.

(2)

Nowhere in its March 22, 1978 letter to the Board (App. 102)* did HEW even refer to the test for intentional discrimination set forth in *Dayton, Arlington Heights, Davis* and *Keyes*. In fact, pursuant to the District Court's decision (Pet. App. 100-101), HEW relied solely on statistical evidence of disparate impact in finding that the Board's policies had "the natural and foreseeable consequence of causing educational segregation", which, HEW contended, constituted intentional discrimination in violation of the Equal Protection Clause (App. 112), *citing Hart v. Community School Board*, 512 F.2d 37, 50 (2d Cir. 1975). *See also, Arthur v. Nyquist*, 573 F.2d 134 (2d Cir. 1978), *cert. den. sub nom. Manch v. Arthur*, —— U.S. ——, 99 S.Ct. 179 (1978).**

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* The March 22, 1978 letter provided, in pertinent part:

> It is our finding that the assignments of minority, particularly black and Hispanic teachers, as well as other teachers in your school district are such that they could have come about only through foreseeable acts of discrimination. The data demonstrating that minority teachers were concentrated in schools at all levels with a predominance of minority students was extensively set out in the November 9, 1976, letter from OCR, in our ESAA denial letter of July 1, 1977, and in the evidence presented to Judge Weinstein in *Board of Education v. Califano*. Equally important is the fact that schools which at all levels were predominantly non-minority in student population, often were staffed by few and sometimes no minority teachers. (App. 108).

** Despite this Court's pronouncements with respect to the requisites for establishing equal protection violations, some courts

In so holding, HEW was incorrect. As we have demonstrated above, the intent of Congress in enacting ESAA and Title VI, as well as Title IV of the 1964 Civil Rights Act, was to make the test for discrimination under these statutes coextensive with the constitutional test for discrimination. This test is enunciated in *Dayton, Arlington Heights, Davis* and *Keyes,* not in the Second Circuit's *Hart-Arthur* decisions. The Court of Appeals for the Second Circuit has itself shown uncertainty as to the continued viability of the *Hart-Arthur* test, (*see, Parents Association of Andrew Jackson High School v. Ambach, supra,* slip op. at 2238), and, we submit, that test is clearly insufficient as a constitutional test for discrimination. Indeed, in *Arlington Heights,* Justice Powell chose not to include foreseeability as one of the factors he suggested were probative on the issue of discriminatory purpose. *See,* 429 U.S. 250, at 265.*

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have held that plaintiff may establish a constitutional violation by showing that the action or inaction of the defendant had the natural foreseeable effect of fostering segregation. This showing will give rise to a presumption of intent which can be rebutted. The defendants must show that the action or inaction was taken in a manner consistent with the absence of segregative intent or that alternative policies were not available which could have accomplished the same goal with less segregation. *See, Arthur v. Nyquist,* 573 F.2d 134, 142 (2d Cir. 1978), *cert. den. sub nom. Manch* v. *Arthur,* —— U.S. ——, 99 S.Ct. 179 (1978); *School District of Omaha v. United States,* 565 F.2d 127, 128 (8th Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978); *Hart v. Community School Board,* 512 F.2d 37 (2d Cir. 1975); *Oliver v. Michigan State Board of Education,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 434 U.S. 1064 (1978). *See generally,* Note, *Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction,* 56 Yale L.J. 317, 322-343 (1976). In the Board's view, the foreseeability test adopted by HEW is inconsistent with this Court's holdings in *Arlington Heights, Davis, Dayton* and *Keyes.*

* To the extent the foreseeability test is meant to be a means of either (1) inferring actual intent or (2) holding parties to a proper standard of care when they are performing certain types of acts, we believe it is important to bear in mind the countervailing consideration that, given the virtually infinite range of possible activities in which a school board or official may engage and the demands which may be made upon that board or official attempting to conduct the affairs of government, this type of test has a great potential for making conduct unlawful which was never intended to be actionable under the Fourteenth Amendment or the various civil rights statutes. That is, it would render conduct unlawful which could by no stretch of the imagination be considered purposively discriminatory. For example, consider a racially neutral seniority system or the employment rules considered in *New York City Transit Auth. v. Beazer,* —— U.S. ——, 47 U.S.L.W. 4291 (March 27, 1979). Or consider the disparate racial impact that would result from abandonment by the Federal government of the CETA program or other programs for the disadvantaged, or implementation by some Federal agency of a hiring policy imposing rigorous education standards. All of these would have a racially disproportionate impact, but presumably are not unlawful.

By the same token, fair account must be taken of the vast array of other facially neutral, but in fact racially skewed, factors with which public as well as private employers must contend. In certain circumstances, as with employment examinations or school assignment or siting decisions, it might be fair to base a finding of discrimination in large part on the theory that a disparate impact which cannot survive strict scrutiny as to necessity is suspect. *See, e.g., Swann v. Charlotte-Mecklenburg,* 402 U.S. 1, 18 (1971), discussed *infra. But see,* this Court's Title VII analysis in *New York City Transit Auth. v. Beazer, supra,* 47 U.S.L.W., at 4295-4296, where in the context of claimed employment discrimination a strict scrutiny test was not applied, only a test of reasonable relatedness. *Compare,* Mr. Justice White's analysis of this question. 47 U.S.L.W., at 4300. In most other situations, as here, the factual context in which action is taken is far more complex, and government conduct cannot be so blithely characterized as discriminatory.

Moreover, even assuming that the *Hart-Arthur* "foreseeability" test for determining constitutionally proscribed discrimination can somehow be viewed as consistent with this Court's rulings in *Dayton, Arlington Heights, Davis* and *Keyes,* it is inescapable that the foreseeability test was not met in this case. *Hart* and *Arthur* require that HEW affirmatively demonstrate that the Board's "*actions* * * * have the natural and foreseeable consequence" of increasing or perpetuating segregation in

order to raise a presumption of segregative intent. *Hart, supra,* 512 F.2d at 50 (emphasis added). *See also, Arthur, supra,* 573 F.2d at 142-143. Here, HEW did not focus on the Board's actions or policies in establishing a presumption of segregative intent, but rather relied solely on statistics.* In effect, HEW's analysis of "foreseeability" in this context is entirely circular; it notes the fact of disparity, and then proceeds to infer that this disparate effect must have been intentionally caused because it was, in some abstract sense, foreseeable (App. 107-108). This is clearly a bootstrap analysis of the question of intent.

Essentially, then, HEW's finding of ESAA ineligibility in this case, both in its initial determination and following the *de novo* proceeding upon remand, was based on nothing more than its original statistical finding of disparate staffing patterns. Even assuming this statistical showing was sufficient to require rebuttal by the Board, in the face of the Board's evidentiary submission made to HEW pointing to the numerous and varied racially neutral factors which had in fact caused this disparity, there was no way HEW could rationally conclude that this disparity was the result of purposively discriminatory action taken by the Board. *See generally, Arlington Heights, supra,* 429 U.S. at 270-271 n. 21, *citing Mt. Healthy City School Dist. Bd. of Education v. Doyle,* 429 U.S. 274 (1977).

While the disparate staffing pattern in this case is apparent, the historical background of the alleged discriminatory policy or practice shows a sequence of events without any hint of invidious purpose. Teacher assignments in the

* The March 22, 1978 letter stated:

> The district has been given an opportunity to rebut the statistical *prima facie* case of discrimination but its explanations are unpersuasive.

(App. 107). *See also, supra,* footnote at p. 57.

New York City public high schools are made pursuant to the results of racially neutral competitive examinations. N.Y. Educ. Law §§2569, 2573, 2590-j(3) (App. 80-81, 96-97, 99; Pet. App. 9-10, 584 F.2d at 581). There was no evidence that teacher assignments and appointments from eligible lists violated the statutory scheme (C.A. App. 43). Although the HEW Office of Civil Rights alleged in 1976 that these exams were violative of Title VI (App. 13-15), there has never been a final administrative or judicial determination of a Title VI violation. Moreover, HEW's allegation of a Title VI violation was based on alleged disparate impact, not intentional discrimination. (App. 14). Thus, in light of *Bakke, supra,* the allegation of a Title VI violation is without merit.

In order to explain the disparate staffing statistics, the following factors, *inter alia,* were relied upon at the administrative level as precluding the random distribution of minority teachers throughout all the high schools.* Racially neutral teacher seniority and excessing provisions contained in collective bargaining agreements resulted in non-minority teachers choosing or remaining in schools near their homes or schools that they otherwise found preferable. (App. 83-85; Pet. App. 62-63). The result was few vacancies in schools with high percentages of non-minority students. The paucity of vacancies in schools with high percentages of non-minority students is indicated in the letter to HEW's Dr. Goldberg, dated January 17, 1978, from the Board (C.A. App. 789, 791) (with charts attached). Thirteen high schools there referred to were all schools with less than 40% minority enrollment (*see*

* Minority teachers totaled less than 9% of all high school teachers during the 1975-76 school year. (App. 91; Pet. App. 13; 584 F.2d at 585).

Pet. App. 14-15; 584 F.2d at 583, n.25). And in the case of all of these schools, for the period from June, 1975 on, undoubtedly due to the onset of the City's fiscal crisis in 1975, only relatively few vacancies are indicated (C.A. App. 790), while, correspondingly, in the 1975-1976 period extensive excessing at these schols is indicated (*id.*). Also relied upon was the Court ordered consent decree in *Aspira of New York v. Board of Education*, 65 F.R.D. 541 (S.D. N.Y. 1974). *Aspira* resulted in a large percentage of the relatively small number of Hispanic teachers being concentrated in schools with high percentages of Hispanic children. (App. 121-123; Pet. App. 54, 63-64). Further, as noted by the District Court (Pet. App. 53, 63), the pool of eligible minority teachers tends to concentrate in vocational rather than academic license areas. Thus, as a practical matter, it must be expected that the vocational schools, which have high percentages of minority students, would have higher concentrations of minority staff. These factors all provide the historical backdrop for HEW's statistical findings and all are neutral, noninvidious justifications for the disparate statistics.* *See also, supra,* pp. 10-12.

In a wide variety of factual contexts where racially disparate impact or effect was concededly present (*i.e.*,

* District Judge Weinstein in acknowledging the positive efforts of the Board toward increasing the percentage of minority staff stated:

> An irony of this litigation is that among the circumstances that now serve to block ESAA funding is the more than two-fold increase in minority teachers in the school system between 1969 and 1976. * * * [HEW] approves the resultant growth in the proportion of minority teachers but not their assignment to predominantly minority schools.

(Pet. App. 61). The percentage of minority teachers in the New York City School System rose from approximately 7% in 1969 to approximately 15% in 1976 (C.A. App. 60).

school segregation (*Keyes* and *Dayton*), employment examinations (*Washington v. Davis*), housing (*Arlington Heights*)), this Court has taken cognizance of the fact that statistics alone do not suffice to establish unconstitutional discrimination. *See also, Jefferson v. Hackney,* 406 U.S. 535 (1972) (involving Aid for Families with Dependent Children). As this Court has noted, "[i]n many instances, to recognize the limited probative value of disproportionate impact is merely to acknowledge the 'heterogeneity of the Nation's population.'" *Arlington Heights, supra,* 429 U.S., at 266, note 15, *quoting Jefferson v. Hackney, supra,* 406 U.S. at 548.

By the same token, for the Board to concede in this case the statistical disparities in school staffing seized upon by HEW is merely to acknowledge the heterogeneity of the employee pool from which teachers are drawn and the variety of neutral, non-invidious factors which affect their being assigned to particular schools. This disparity, in fact, proves nothing once these other factors are considered. Analysis of the data and justifications presented by the Board to HEW at the administrative level for the statistical disparity in teacher assignments establishes that under the test of purposeful discrimination set forth in *Arlington Heights, et al.,* HEW could not make a finding of unlawful discrimination (C.A. App. 498-507).

(3)

In alleging that the Board's teacher assignment policies constitute a *prima facie* case of intentional discrimination, HEW also relied upon language in *Swann v. Charlotte Mecklenburg,* 402 U.S. 1 (1971), that a *prima facie* equal protection violation exists "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff * * *" *Id.*

at 18 (App. 108-109).* The Board respectfully submits that HEW's application of this language from *Swann* to conditions in the City of New York is entirely disingenuous. *Swann* concerned the permissible scope of desegregation activities in the state enforced dual school systems of the South. *Id.* at 5-6. *Swann's* language with respect to establishing a *prima facie* constitutional violation on the basis of disproportionate racial composition of teaching and other staff was limited to defining what aspects of a dual school system are constitutionally susceptible to remedial actions. *Id.* at 18. It was not intended to affect the standards for determining discrimination in school systems like that in New York City which have never been found to be dual systems either as a result of state law or as a result of intentional official action. Indeed, in *Keyes v. School District No. 1,* 413 U.S. 189 (1973), this Court interpreted *Swann's* statement that disproportionate racial composition of staff will establish a *prima facie* equal protection violation as being relevant only where a school system has a "history of segregation." *Id.* at 210. A system with a "history of segregation" was defined as a "• • • statutory dual system or an allegedly unitary system where a meaningful portion of the system is found to be intentionally segregated" *Id.*

Clearly, the school system of the City of New York does not fit into *Keyes'* definition of a system with a "history of segregation." There has never been an administrative or judicial finding that a "meaningful portion" of New York City public schools are "intentionally segregated." It was inappropriate, therefore, for HEW to apply *Swann's* equal protection analysis to the case at bar.*

Furthermore, *Keyes* strongly suggests that under *Swann* the shifting of the burden to the school systems with a "history of segregation" where there is a disproportionate racial composition of teaching staff is appropriate only where the disproportionate composition is due to disproportionate "discharge"—not assignment—of black teachers:

> In the context of racial segregation in public education, the courts, including this Court, have recognized a variety of situations in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in *Swann,* 402 U.S. at 18, we observed that in a system with a "history of segregation", "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." Again, in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation "thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence."

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* *See also,* Defendant-Appellees' Brief to Second Circuit at 48-49; Memorandum for the Respondents in Opposition to Petition for a Writ of Certiorari at 5, n. 3.

* *Keyes* held that *Swann's prima facie* equal protection analysis was applicable in schools with a "history of segregation" because

> [T]he existence of subsequent or other segregated schooling within the same system justifies a rule imposing on the school authorities the burden of proving that this segregated schooling is not also the result of intentionally segregative acts.

Keyes, supra, 413 U.S. at 210.

Id. at 209, *citing Chambers v. Hendersonville City Board of Education,* 364 F.2d 189, 192 (4th Cir. 1966) (*en banc*) (citations omitted).

Keyes' analysis of *Swann* leads to the inescapable conclusion that it was impermissible for HEW to conclude that the Board's teacher assignment policies constitute a *prima facie* equal protection violation due to the racially disproportionate composition of the teaching staffs at some schools. HEW's inappropriate use of the disparate impact test and its failure to have established constitutionally proscribed intentional discrimination on the part of the Board mandates that its finding of ineligibility should be set aside. *See, Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415-417 (1971).

Throughout the entire history of this controversy between HEW and the Board of Education of the City of New York, HEW has endeavored, by a strained reading of ESAA and prior decisions of this Court, to deprive the students being educated in the New York City public schools of Federal assistance to which they are clearly entitled under ESAA. HEW has done this despite what we have demonstrated was the intent of Congress in enacting ESAA. This case presents the opportunity to point out to HEW that it does not have a commission, no matter how benign its motives, to displace Congress as lawmaker.

The Board of Education of the City of New York has, voluntarily, attempted to combat the effects of past, and present, *de facto* segregation of the races. *See, Parents Association of Andrew Jackson High School v. Ambach, supra,* slip op. at 2225 (2d Cir., April 17, 1979); *see also,* App. 78. In a complex area in which a host of historical and sociological considerations have to be taken into account, there are no simple, uncomplicated solutions. HEW's

narrow and rigid approach in this case ignores social and historical as well as legal realities, and in the process visits injustice upon the students who are in the charge of this school board.

CONCLUSION

The judgment of the Court of Appeals should be reversed and this case remanded to the District Court with a direction to enter judgment declaring that HEW's finding of ineligibility was improper and directing HEW to dispense the withheld ESAA funds to the Board.

May 11, 1979

Respectfully submitted,

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APPENDIX

HOUSE

HR 17846

5/27/70—
HR 17846 (ESAA of 1970) introduced in the House by Rep. Rooney.

6/8/70—
HR 17846 referred to House Committee on Education and Labor for consideration.

HR 19446

9/24/70—
HR 19446 introduced by Rep. Bow and sent to the House Committee on Education and Labor.

11/30/70—
Committee on Education and Labor reported out HR 19446 to the full house.

12/15/70—
House met on HR 19446 as a committee of the whole.

12/21/70—
HR 19446 was passed by the House.

SENATE

S 3883

5/20/70—
S 3883 was introduced into the Senate by Senators Javits and Pell and referred to Senate Committee on Education and Social Welfare.

6/9/70 to
8/27/70—
S 3883 was considered in Committee but never reported out.

HR 19446

12/22/70—
HR 19446 was sent to the Senate by the House one day after the House passed this bill. The House sent HR 19446 realizing that the Senate had not reported its own ESAA bill (S 3883) out of committee.

12/28/70 to
12/31/70—
The House deliberated on HR 19446. No action taken by the House on HR 19446 or on S3883.

APPENDIX

HOUSE

HR 2266

1/26/71—
HR 2266 represented HR 19446 (1970) in substantially similar content. It was introduced by Rep. Bell and referred to the House Committee on Education and Labor.

11/1/71—
HR 2266 as a consolidation of all other related bills referred to Committee was reported out to a Committee of the House on the whole. HR 2266 was defeated by the House.

11/3/71—
HR 2266 was reintroduced into the House as part XXI of HR 7248, the Higher Education Act.

11/4/71—
HR 7248 with ESAA of 1971 as part XXI of the Higher Education Act was passed by the House.

HR 5596

3/4/71—
HR 5596, an alternate version of ESAA of 1971 was introduced by Rep. Fascell and referred to the House Committee on Education and Labor.

HR 10338

8/3/71—
HR 10338, an alternate revision of ESAA of 1971 was introduced by Rep. William F. Ford and referred to the House Committee on Education and Labor.

SENATE

S 1557

4/15/71—
S 1557 (ESAA of 1971) was introduced into the Senate by Sen. Pell.

4/21/71—
Sen. Ribicoff's amendment proposed and rejected by the Senate.

4/22/71—
Sen. Stennis amendment proposed and passed by the Senate.

4/26/71
S 1557 passed by the Senate.

92nd Cong. 2nd Sess. (1972)

118 Cong. Rec.

HOUSE	SENATE
S 659	S 659
	2/22/72—S 659, ESAA of 1972, was introduced as an amendment to the Higher Education Act of 1965. Included in S 659 were both the House version (HR 2266) and Senate version (S 1557) of ESAA of 1971.
	3/ 8/72—S 659 sent out to Conference Committee of the House and Senate.
	5/22/72—Conference Committee reported out S 659 to the Senate.
5/22/72—Conference Committee reported out S 659 to the House.	
	5/24/72—Senate approved Conference report.
6/ 8/72—House approved Conference report.	
6/12/72—S 659 signed by Speaker of the House.	6/12/72—S 659 signed by President Pro Tempore of the Senate.
	6/12/72—S 659 presented to President Nixon for signature.
	6/23/72—S 659 signed into law by President Nixon as the Emergency School Aid Act of 1972.